

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALPINE LASER CLINIC, INC. Plaintiff
v.
CANDELA CORPORATION, Defendants

05 - 11747 RWZ Civil No. 05-11747 RWZ

MAGISTRATE JUDGE *Sandlin*

COMPLAINT AND JURY DEMAND

PARTIES AND JURISDICTION

1. The Plaintiff ALPINE LASER CLINIC, INC., (ALPINE) is a corporation duly organized and existing under the laws of the State of Colorado and having its principal place of business at 205 E. Chambers Ave., Eagle, CO 81631.

2. The Plaintiff is informed and believes that the Defendant CANDELA CORPORATION (CANDELA) is a corporation duly organized and existing under the laws of the State of Delaware and having its principal place of business at 530 Boston Post Road, Wayland, MA 01778.

3. The Plaintiff is a citizen of Colorado, and the Defendant is a citizen of both Delaware and Massachusetts. Accordingly, there is complete diversity of citizenship between all plaintiffs and all defendants.

4. The amount in controversy in this action exceeds \$75,000, exclusive of interest and costs.

5. All defendants reside within this District, and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District.

6. This court therefore has jurisdiction over this cause pursuant to 28 U.S.C. § 1332. Venue is proper in this District under 28 U.S.C. § 1391(a).

RECEIPT # *66468*
AMOUNT \$ *250*
SUMMONS ISSUED *4*
LOCAL RULE 4.1 *✓*
WAIVER FORM *✓*
MCF ISSUED *✓*
BY DPTY. CLK. *SDM*
Date *8/21/05*

FACTS

7. On or about September 18, 2003, ALPINE purchased a dermatology laser (the Laser), model GentleLase with DCD Option, serial number 9914-0880-1127 from CANDELA.

8. The purchase of the Laser was pursuant to a so-called "Finance Lease" in which CANDELA agreed to deliver the Laser to ALPINE; ALPINE agreed to pay \$92,261.44 to Sterling National Bank, a New York corporation (STERLING); and STERLING agreed to pay CANDELA \$74,500.

9. The agreement between ALPINE and STERLING relative to the Laser included a Master Equipment Lease executed on May 24, 2000; certain personal guarantees by the principals of ALPINE; a Lease Schedule numbered 3219-02 executed by ALPINE on September 9, 2003 and by STERLING on October 2, 2003; an Addendum to Master Lease Agreement No. 3219-02 concerning the physical location at which ALPINE would keep the Laser; and a Purchase Option dated September 9, 2003, whereby ALPINE was to have the option to purchase the Laser at the end of the term of the so-called lease for \$1.00 plus applicable taxes.

10. The Master Equipment Lease between ALPINE and STERLING included clauses placing the entire risk of loss, theft, destruction or damage to the Laser from any cause on ALPINE; permitting STERLING to demand payment in full of all sums denominated as rents upon certain defaults by ALPINE; and specifying the law of New York to govern construction of the lease.

11. ALPINE initially purchased a three-year extended warranty on the Laser from CANDELA. ALPINE and CANDELA later agreed to apportion two years of extended

warranty service to a different dermatology laser, previously purchased by ALPINE from CANDELA and not otherwise relevant to this action, and one year of extended warranty service to the Laser. As a result, ALPINE believed that it was entitled to warranty service on the Laser from CANDELA until September 9, 2005.

12. The Laser was installed on or about September 23, 2003, by persons designated by CANDELA at ALPINE's Avon, Colorado, location, at approximately 7,900 feet elevation above sea level.

13. ALPINE attempted to operate the Laser according to the instructions supplied by CANDELA. In particular, ALPINE used the Laser only in a room that, at the time of attempted operation, conformed to CANDELA's specifications concerning temperature and humidity. The Laser nonetheless never worked correctly. Each time ALPINE attempted to use the Laser with a patient, the Laser would spontaneously "purge" and cease operation after a few pulses. ALPINE was usually unable to reset the Laser on its own and therefore needed to wait for CANDELA's service technician to arrive and fix the problem. The operational problems with the Laser were so severe that ALPINE could not use it for patient procedures, and ALPINE stopped attempting to use it in December of 2003. ALPINE resumed attempts to use the Laser on June 14, 2004, at the request of CANDELA'S representative, but had the same problems on each attempt. CANDELA's service representatives were unable to reproduce the problem and never proffered any advice that permitted ALPINE to successfully use the Laser.

14. ALPINE wrote several letters to CANDELA between February 20, 2004, and March 30, 2004, in an effort to resolve the problems with the Laser. It never received any reply.

15. On or about January 25, 2005, ALPINE returned the Laser to CANDELA in care of Linda Trice at 530 Boston Post Road, Wayland, MA 01778, via Custompack & Shipping Service of Vail, CO, at a cost of \$510.80. CustomPack has informed ALPINE that a person by name of Beaudoin accepted and signed for the return behalf of CANDELA on February 2, 2005, at 2:00 p.m.

16. Accompanying the returned Laser was a letter dated January 25, 2005, from David T. Bonfiglio, an Arizona attorney who was then representing ALPINE. The letter summarized the problems ALPINE had been having with the Laser and requested a replacement unit. ALPINE never received a reply to this letter. ALPINE is informed and believes that Attorney Bonfiglio never received a reply to this letter.

17. ALPINE wrote another letter directly to Gerard Puorro, CANDELA's President, on June 14, 2005 pleading for help with the problem. It has not, prior to the date of this complaint, received any reply.

**COUNT 1
BREACH OF EXPRESS AND IMPLIED WARRANTIES**

18. The Plaintiff repeats the allegations in paragraphs 1-17.

19. The Laser did not perform as expressly and implicitly warranted by CANDELA, whereby ALPINE suffered direct, consequential and incidental damages including but not limited to loss of sums expended to purchase the Laser, interest paid to STERLING, lost profits, unnecessary expenses (including labor and travel) connected with placing service calls and being present in Avon to receive the service technician, and damage to its credit rating.

**COUNT 2
REVOCATION OF ACCEPTANCE**

20. The Plaintiff repeats the allegations in paragraphs 1-17.

21. Despite its literal form, the arrangement between ALPINE and STERLING created a security interest in STERLING to secure payment of \$92,261.44, such that Article 2 of the Uniform Commercial Code applies to the transaction between ALPINE and CANDELA, and Article 9 to the transaction between ALPINE and STERLING.

22. If ALPINE accepted the Laser, it did so in the belief that the Laser conformed to the representations and descriptions provided by CANDELA, before discovery that the Laser did not so conform, and in the belief that CANDELA would promptly cure any nonconformity that might be discovered.

23. The Laser did not perform as represented and described by CANDELA, and such failure to perform substantially impaired the value of the Laser to ALPINE.

24. If ALPINE accepted the Laser, it rightfully revoked its acceptance by returning the Laser to CANDELA on or about January 25, 2005, which date was within a reasonable time after it became apparent to ALPINE that CANDELA would be unable to repair the Laser to make it so conform and that CANDELA would not replace the Laser with a conforming substitute, and which date was before any substantial change in the condition of the Laser occurred which was not caused by the Laser's own defects.

25. If Alpine accepted the Laser, it is entitled by reason of its rightful revocation of acceptance to recover direct, consequential and incidental damages including but not limited to loss of sums expended to purchase the Laser, interest paid to STERLING, lost profits, unnecessary expenses (including labor and travel) connected with placing service calls and being present in Avon to receive the service technician, and damage to its credit rating.

COUNT 3
UNFAIR OR DECEPTIVE ACTS OR PRACTICES

26. The Plaintiff repeats the allegations in paragraphs 1-17.
27. CANDELA refused to provide warranty service for the Laser after September 9, 2004.
28. CANDELA failed to honor its warranty obligations to ALPINE and breached its implied obligation to deal fairly and in good faith with ALPINE, whereby ALPINE suffered direct, consequential and incidental damages including but not limited to loss of sums expended to purchase the Laser, interest paid to STERLING, lost profits, unnecessary expenses (including labor and travel) connected with placing service calls and being present in Avon to receive the service technician, and damage to its credit rating.
29. Such failure and breach by CANDELA occurred primarily and substantially at CANDELA's corporate headquarters in Massachusetts.
30. CANDELA thereby willfully or intentionally committed one or more acts, or engaged in a practice, that violate Mass. Gen. L. c. 93A, § 2.

COUNT 4
EQUITABLE RELIEF

31. The Plaintiff repeats the allegations in paragraphs 1-17.
32. ALPINE is entitled to require CANDELA to exonerate ALPINE's obligations to STERLING and to indemnify ALPINE from all claims and demands made by STERLING arising from any failure by ALPINE to make payments to STERLING in respect of the Laser.

RELIEF REQUESTED

WHEREFORE the Plaintiff demands judgment against the Defendant as follows: (1) on Counts 1 and 2, for actual damages (including direct, consequential and incidental damages) under Article 2 or Article 2A of the Massachusetts, New York, or Colorado Uniform Commercial Code, whichever may apply; and (2) on Count 3, for actual damages, double or treble damages, and attorney's fees pursuant to Mass. Gen. L. c. 93A, § 11. The Plaintiff further prays that this court might order the Defendant to exonerate the security or other interest held in the Laser by Sterling National Bank and to indemnify and save the Plaintiff harmless from any and all demands for payment by Sterling National Bank on account of the Laser.

The Plaintiff demands trial by jury on all issues triable as of right by jury.

Dated: August 24, 2005

ALPINE LASER CLINIC, INC., by its attorney,



Walter Oney (BBO # 379795)
4 Longfellow Place
Boston, MA 02114
Tel: 617-227-5620
Fax: 617-227-5760

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS1. Title of case (name of first party on each side only) Alpine Laser Clinic, Inc. v. Candela Corporation

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.

II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, *Also complete AO 120 or AO 121
740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. for patent, trademark or copyright cases

III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310,
315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371,
380, 385, 450, 891.

IV. 220, 422, 423, 430, 460, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660,
690, 810, 861-865, 870, 871, 875, 900.

V. 150, 152, 153.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

None

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES NO

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES NO

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES NO

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES NO 7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).YES NO A. If yes, in which division do all of the non-governmental parties reside?Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Walter OneyADDRESS 4 Longfellow Place, Boston, MA 02114TELEPHONE NO. 617-227-5620

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Alpine Laser Clinic, Inc.		DEFENDANTS Candela Corporation	
(b) County of Residence of First Listed Plaintiff <u>Eagle, CO</u> (EXCEPT IN U.S. PLAINTIFF CASES)		County of Residence of First Listed Defendant <u>Middlesex, MA</u> (IN U.S. PLAINTIFF CASES ONLY)	
		NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known)	
(c) Attorney's (Firm Name, Address, and Telephone Number) Walter Oney, 4 Longfellow Place, Boston, MA 02114 617-227-5620			
II. BASIS OF JURISDICTION (Place an "X" in One Box Only)		III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)	
<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)	Citizen of This State <input type="checkbox"/> PTF <input type="checkbox"/> DEF	Incorporated or Principal Place of Business In This State <input type="checkbox"/> PTF <input checked="" type="checkbox"/> DEF
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	Citizen of Another State <input type="checkbox"/> PTF <input type="checkbox"/> DEF	Incorporated and Principal Place of Business In Another State <input type="checkbox"/> PTF <input type="checkbox"/> DEF
		Citizen or Subject of a Foreign Country <input type="checkbox"/> PTF <input type="checkbox"/> DEF	Foreign Nation <input type="checkbox"/> PTF <input type="checkbox"/> DEF
IV. NATURE OF SUIT (Place an "X" in One Box Only)		FORFEITURE/PENALTY	
CONTRACT		TORTS	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise		PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	
REAL PROPERTY		PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	
CIVIL RIGHTS		PRISONER PETITIONS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	
VI. CAUSE OF ACTION		Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): <u>28 U.S.C. 1332</u> Brief description of cause: <u>Breach of warranty</u>	
VII. REQUESTED IN COMPLAINT:		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ 90,000.00
VIII. RELATED CASE(S) IF ANY (See instructions):		JUDGE <u>Walter Oney</u>	
DATE	SIGNATURE OF ATTORNEY OF RECORD		
08/24/2005			
FOR OFFICE USE ONLY			
RECEIPT #	AMOUNT	APPLYING IFFP	JUDGE
			MAG. JUDGE